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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 123

MANUAL ENTERPRISES, INC., A body corporate; TRIM ENTERPRISES, INC., A body corporate; GRECIAN GUILD, A body corporate, PETITIONERS

v.

J. EDWARD DAY, Postmaster General of the United States

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the District Court for the District of Columbia (J.A. 82-83) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 2a-4a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 1961 (Pet. 1a). The petition for a writ

of certiorari was filed on May 29, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' publications were properly excluded from the mails on the ground that the dominant theme of the publications was an appeal to the prurient interest of homosexuals and that the publications contained information as to where similar obscene matter could be obtained.

2. Whether withholding publications from the mail pursuant to 18 U.S.C. 1461, pending an administrative determination of their mailability, amounts to an unconstitutional prior restraint.

STATUTE INVOLVED

18 U.S.C. 1461 provides in pertinent part:

> § 1461. *Mailing obscene or crime-inciting matter.*
>
> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be pre-

vented or abortion produced, whether sealed or unsealed; and

* * * * *

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

* * * * *

STATEMENT

Petitioners brought this action to compel the Post Office Department to accept for mailing 255 copies of the April 1960 issue of *MANual* magazine, 75 copies of the May 1960 issue of *Trim* magazine, and 75 copies of the May 1960 issue of *Grecian Guild Pictorial* magazine. These items were excluded from the mails after an administrative hearing in which the Judicial Officer of the Post Office Department found that the maga-

zines were nonmailable under 18 U.S.C. 1461, *supra*, pp. 2-3, because they were obscene and conveyed information as to where pornographic photographs could be obtained. The three publications are allegedly physique magazines, but they are composed almost exclusively of photographs of nearly nude male models. Herman L. Womack is the publisher of each magazine.

The relevant facts may be summarized as follows:

On April 5, 1960, the General Counsel of the Post Office Department ruled that the magazines in question were obscene and therefore nonmailable (Pet. 3). Petitioners thereupon filed a complaint for injunctive relief in the District Court for the District of Columbia. That court denied the petitioners' motions for injunctive relief, but remanded the case to the Post Office Department for an administrative adjudication of whether the magazines were nonmailable within the meaning of 18 U.S.C. 1461 (R. Mem. 2).[1]

On April 14, 1960, the General Counsel filed a complaint with the Judicial Officer of the Post Office Department alleging that the magazines should be excluded from the mails because they were obscene and because they contained advertisements as to where obscene materials could be purchased (R. Mem. 3). Beginning on April 21, 1960, adjudicatory hearings were held before the Judicial Officer after the parties had stipulated to waive the rules requiring a hearing before a hearing examiner (R. Mem. 3).

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[1] The record in the Court of Appeals filed in this Court has not been completely paginated. "R. Mem." refers to the Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of Defendants' Motion for Summary Judgment, which is a part of the unpaginated record.

Both parties introduced expert witnesses, psychiatrists and psychologists, and the experts agreed that these so-called body building magazines would not appeal to the prurient interests of the average male member of the community (R. Mem. 3-4). However, the government experts concluded that the dominant theme of the publications was an appeal to the prurient interests of homosexuals (J.A. 8, 41, 48, 72-73).[2] They noted that the magazines were almost entirely composed of photographs which had nothing to do with body-building but which displayed the model in such a manner as to stimulate the erotic fantasies of the homosexual[3] (J.A. 4, 7-8, 42, 46-47). Thus, the pictures exhibited the model's buttocks, pubic hair or semi-erect penis (J.A. 4, 5, 16, 17, 22; 6, 7, 19), or they employed fetishistic symbols such as swords and chains (J.A. 5-6, 12, 13). Furthermore, the general structure of the magazine was found by these witnesses to contribute to this arousing effect (J.A. 5, 44-45), and the advertisements for "exciting pictures" were also believed to stimulate the reader to order the photographs so as "to become sexually excited as the picture promises" (J.A. 24, 25). Finally, the government experts concluded that homosexuals probably were the major audience for these publications (J.A. 8; R. Mem. 7).

The testimony of the petitioners' expert witnesses was to the effect that this type of magazine and picture would only have a minimal effect on practicing homo-

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[2] One of the government's expert witnesses testified: "Not only the dominant theme, but the only theme" (J.A. 48).

[3] It was also testified that adolescents and other borderline cases can and have been diverted into homosexual patterns by these types of pictures (J.A. 8-10, 42).

sexuals and perhaps a greater impact on frustrated homosexuals (J.A. 49), and would have no effect on the average male member of the community (J.A. 52-58, 72-73).

Counsel for the Post Office Department also introduced evidence at the hearing that Mr. Womack knew that this type of magazine appealed to and was purchased by homosexuals (J.A. 60, 69-70). It was also shown that Womack was selling photographs of nude male models under the corporate name of Continental Artists, and that Womack stated that he knew that homosexuals would be the audience for this type of picture [4] (J.A. 63). This evidence was not rebutted.

A Post Office inspector also testified that he had submitted orders to some of the advertisers and received from them photographs of nude males. He stated that in his experience additional orders would produce progressively more pornographic portraits (J.A. 63-64; see also R. Mem. 7-10).

On April 28, 1960, the Judicial Officer held that the several issues of petitioners' magazines were nonmailable because their dominant theme was an appeal to the prurient interests of homosexuals, and because they contained advertisements as to where to obtain pornographic materials (Pet. 3, 4).

On May 13, 1960, petitioners instituted this action for an injunction in the district court (Pet. 4-5). After cross-motions for summary judgment were made, the court held that the decision of the Judicial Officer

[4] In connection with the Continental Artists enterprise, Womack was convicted by a jury for mailing information where to obtain obscene matter and for actually mailing obscene photographs. See *Herman L. Womack* v. *United States* C.A.D.C., No. 15749, Jan. 12, 1961, certiorari denied, 365 U.S. 859.

was supported by the evidence and granted respondent's motion for summary judgment (J.A. 82-83).

On appeal, petitioners contended that the publications were not obscene under the test laid down in *Roth* v. *United States*, 354 U.S. 476, because they had no effect on the average male. They also claimed that the magazines could not be excluded on the ground that they contained advertisements as to where obscene matter could be obtained because Womack did not know that the advertisers were dealing in pornography. Finally, the petitioners asserted that the exclusion of the magazines pending the outcome of the adjudicative determination of their mailability amounted to an unconstitutional prior restraint. The Court of Appeals rejected these arguments and held that the publications were obscene because their primary purpose was to appeal to the prurient interests of a particularly susceptibe group. The court said (Pet. App. 3a-4a):

> Appellants contend that even if these pictures do arouse prurient interests in homosexuals, they are not obscene within the definition of *Roth* v. *United States*, 354 U.S. 476 (1957), the so-called "average person in the community" test. It seems to us that the real meaning of *Roth* is that the object in question is not to be considered in terms of the reaction of an isolated atypical consumer. A case of obscenity thus is not to be predicated on the reaction of the peculiarly prudish or susceptible, and neither is a defense to such a charge to be predicated on the lack of reaction on the part of the peculiarly jaded. On the basis of the evidence before the administrative body, we think that "the average member of the community"

would be an atypical reader of these magazines. The proper test in this case, we think, is the reaction of the average member of the class for which the magazines were intended, homosexuals. The testimony of record was clearly to the effect that these magazines would arouse prurient interest in the average homosexual. The finding that the magazines were obscene within the meaning of the statute is therefore affirmed.

ARGUMENT

Both courts below have held that there was ample evidence to support the administrative findings, and have concluded that petitioners' publications were obscene under 18 U.S.C. 1461 and *Roth* v. *United States*, 354 U.S. 476. The concurrent findings of the two lower courts are clearly correct, there is no conflict, and no general issue calling for review on this record is presented.

1. The petitioners claim that these magazines are not obscene within the meaning of *Roth* v. *United States*, 354 U.S. 476, because they do not appeal to the prurient interests of the average member of the community. Petitioners' publications are not, however, intended for "the average person in the community" but are directed at a particular class—homosexuals. Material which might not affect the average person may nevertheless be obscene if it is primarily directed to a particularly susceptible audience, such as the immature, the deviate or the homosexual, for the purposes of satisfying or stimulating a craving for erotic fantasy. *Klaw* v. *Schaffer*, 151 F. Supp. 534 (S.D. N.Y.), affirmed, 251 F. 2d 615 (C.A. 2); *Parmelee* v. *United States*, 113 F.

2d 729 (C.A.D.C.); *United States* v. *Levine*, 83 F. 2d 156 (C.A. 2); A.L.I. Model Penal Code, Tentative Draft No. 6 (1957) § 207.10(2);[5] Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 70-84; Lockhart and McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 340.

To consider the effect of the dominant theme of the material on the special group it is designed and most likely to reach is not at all a return to the rule of *Regina* v. *Hicklin* [1868], L.R. 3 Q.B. 360, *i.e.*, allowing generally disseminated "material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons." See *Roth* v. *United States*, 354 U.S. at 488-489. The nature of the particular group sought to be stimulated is the controlling factor. It cannot be said that magazines which are specifically intended to stimulate the homosexual are not obscene merely because they do not sexually arouse the average member of the community. Such a result would permit the panderers of pornography to exploit the immature and susceptible at will, without furthering the public's right of access to works with the slightest redeeming social importance.[6]

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[5] The Model Penal Code provides in pertinent part: "Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience."

[6] The case of *United States* v. *31 Photographs, etc.*, 156 F. Supp. 350 (S.D. N.Y.), further demonstrates that obscenity cannot be determined without considering the probable audience of the material. In this case, customs officials attempted to prevent the importing

In the present case, the expert testimony and the admissions of the publisher (Womack) conclusively established that homosexuals, or persons with such tendencies, were the primary purchasers of these magazines, that Womack was aware of this, and that the dominant theme—indeed, "not only the dominant theme, but the only theme" (J.A. 48)—of each magazine was an appeal to the prurient interests of the homosexual. A cursory glance at each magazine leads only to the conclusion that they have nothing to do with body building since they contain practically no textual material and very few of the pictures display any body-building exercises or equipment. For recent cases holding comparable pictures obscene, see *Collier* v. *United States*, 283 F. 2d 780 (C.A. 4), certiorari denied, 365 U.S. 833; *Womack* v. *United States*, C.A.D.C., No. 15749, decided Jan. 12, 1961, certiorari denied, 365 U.S. 859.

2. The petitioners cite *Mounce* v. *United States*, 247 F. 2d 148 (C.A. 9), remanded, 355 U.S. 180, *One, Inc.* v. *Olesen*, 241 F. 2d 772 (C.A. 9), reversed, *per curiam*,

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of photographs which were to be used in connection with the Kinsey study of sexual behavior on the ground that the materials would admittedly appeal to the prurient interests of the average man. The court held that the photographs were not obscene because they would not sexually arouse the group who would use the materials (p. 354):

> To whose prurient interest must the work appeal? While the rule is often stated in terms of the appeal of the material to the "average person", Roth v. United States, 1957, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, it must be borne in mind that the cases applying the standard in this manner do so in regard to material which is to be distributed to the public at large. I believe, however, that the more inclusive statement of the definition is that which judges the material by its appeal to "all those whom it is likely to reach", United States v. Levine, 2 Cir., 1936, 83 F. 2d 156, 157.

355 U.S. 371, and *Sunshine Book Company* v. *Summerfield*, 128 F. Supp. 564 (D. D.C.), affirmed, 249 F. 2d 114 C.A. D.C.), reversed, *per curiam*, 355 U.S. 372, for the proposition that a publication which caters to the sexual appetite of a susceptible group is not obscene if it would not affect a normal, healthy individual These cases are inapposite. Unlike petitioners' publications, the dominant theme in these publications was not an appeal to the prurient interest. The magazine *One* dealt with the general problems of the homosexual and only contained two isolated items which could conceivably have been regarded as lewd, while the lower court ruling in *Sunshine* was based on five photographs occupying less than 3% of the magazine, which was devoted to promotion of the general idea of nudism. See, *e.g.*, *Collier* v. *United States*, 283 F. 2d 780, 782 (C.A. 4), certiorari denied, 365 U.S. 833. *Mounce* was remanded upon the government's confession of error on the ground that the trial court had applied the erroneous pre-*Roth* standard of obscenity.

3. Independently of whether the magazines are themselves obscene, they may be barred from the mails under 18 U.S.C. 1461 on the ground that they contain information as to where, how, and from whom obscene materials can be obtained. The petitioners do not dispute the fact that the magazines contain such information. Nevertheless, they argue that the magazines should not be excluded from the mails because the publisher did not know that the advertisers dealt in pornography, citing *Smith* v. *California*, 361 U.S. 147. It would appear, however, that Womack knew that the advertisements contained such information. The Post Office Department had informed him earlier that some

advertisers were distributing pornographic photographs; he knew that the homosexual was the major market for this type of magazine and picture; he was in the same type of business as the advertisers and was himself convicted of sending obscene photographs through the mail. *Womack* v. *United States*, C.A.D.C., No. 15749, decided Jan. 12, 1961, certiorari denied, 365 U.S. 859.

4. The petitioners also contend that the exclusion of these magazines from the mails pending the administrative determination of their mailability constituted an unconstitutional prior restraint. This argument, too, is without merit. It has long been recognized that the Post Office Department has authority to exclude matter from the mails,[7] *Ex parte Jackson*, 96 U.S. 727, 735-36; *In re Rapier*, 143 U.S. 110; *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407; *Monart, Inc.* v. *Christenberry*, 168 F. Supp. 654 (S.D. N.Y.), and that such an exclusion, if proper, does not violate the First Amendment. *Donaldson* v. *Read Magazine*, 333 U.S. 178; *Sunshine Book Company* v. *Summerfield*, 249 F. 2d 114 (C.A. D.C.), reversed on other grounds, 355 U.S. 372; *Klaw* v. *Schaffer*, *supra*. In *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, this Court held that a state statute which temporarily restrained the distribution of a publication pending determination of the issue of obscenity was not an unconstitutional prior restraint. See, also, *Times Film Corp.* v. *Chicago*, 365 U.S. 43.

We doubt that any serious First Amendment issue

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[7] Of course, a hearing must be granted. *Walker* v. *Popenoe*, 149 F. 2d 511 (C.A.D.C.).

can arise out of Congress' clear direction that the Postmaster General should exclude obscene matter from the mail, so long as that mandate is fairly and expeditiously followed, and is subject to judicial review. Obscenity is not protected by the Constitution in state criminal proceedings (*Alberts* v. *California*, 354 U.S. 476), in federal prosecutions for depositing it in the mails (*Roth* v. *United States*, 354 U.S. 476), or in speedy state civil injunction proceedings to restrain its sale (*Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436). It should not be treated differently in federal administrative proceedings conducted with dispatch, as was this proceeding. One who distributes obscenity through the mail should have no greater rights under the First Amendment than one who uses the mails to conduct a fraudulent enterprise. *Donaldson* v. *Read Magazine*, 333 U.S. 178; *Public Clearing House* v. *Coyne*, 194 U.S. 497.[8]

[8] The recent decision in *Marcus* v. *Search Warrants*, No. 225, Oct. Term 1960, decided June 19, 1961, is plainly distinguishable on the grounds, among others, that here there was no mass wholesale search-and-seizure of all materials thought by the seizing officers to be obscene (*i.e.*, a complete restraint on all distribution), but solely the exclusion from the mails (*i.e.*, from only one of the means of distributing magazines) of particular publications, offered by petitioners for mailing, which were preliminarily determined by responsible officials to be obscene.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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